SERVED: October 7, 1992

NTSB Order No. EA-3688

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of September, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. THOMAS J. BOOTH, Respondent.	)	Docket SE-12108

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on November 11, 1991, following an evidentiary hearing.[1] We deny the appeal.

[1]The initial decision, an excerpt from the hearing transcript, is attached. This proceeding was also the subject of a prior hearing, on September 27, 1991. At that hearing, the law judge considered and denied a motion to dismiss filed by respondent. The law judge summarized this action in his November decision, and it is further discussed infra, in light of respondent's appeal.

By emergency order,[2] the Administrator sought to revoke respondent's first class medical certificate for violation of 14 C.F.R. 67.20(a)(1).[3] The Administrator charged that respondent's answers to certain questions on his April 9, 1990 medical application were intentionally false or fraudulent. Specifically, the Administrator charged that, contrary to his answers for Items 21(n) and (o), respondent had a "drug or narcotic habit," and an "excessive drinking habit."[4] The Administrator further charged that respondent's answer to Item 21(v), which seeks information regarding traffic convictions, was incomplete and inaccurate.

The law judge affirmed the Administrator's order, finding that respondent's answers in the three areas were intentionally false. In doing so, he noted the applicable precedent: to prove an intentionally false statement, the Administrator must show a false representation, made in reference to a material fact, and with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976). The law judge also acknowledged the

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[2]Respondent waived the 60-day emergency procedures. See Tr. at 7, 322.

[3]Federal Aviation Regulation (FAR) § 67.20(a)(1) provides:

(a) No person may make or cause to be made--

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part[.]

[4]Item 21 actually asks, for each category, "Have you ever had or have you now any of the following: (For each 'yes' checked, describe condition in REMARKS)."

significance of credibility assessments to his determination. Tr. at 327.

Respondent, now appearing pro se,[5] argues, in effect, that the preponderance of the evidence does not support the law judge's conclusion.[6] We disagree. In cases where intent or knowledge must be proven to find a violation, it is not atypical that circumstantial evidence is used. See, e.g., Administrator v. Johnson, 5 NTSB 279 (1985). Moreover, the record here supports the initial decision.[7]

Respondent acknowledged that the medical application would be the basis for an evaluation of his capability and ability to fly, and that the medical examiner would be relying on respondent's answers to the various questions. Tr. at 293-294. Regarding Items 21(n) and (o), respondent admitted that, at the time he completed the application (April 9, 1990), he had already sought in-hospital treatment for drug and alcohol problems, had been in Alcoholics Anonymous on and off since 1982, and had been

[5]At the hearing, respondent was represented by counsel.

[6]Respondent claims that "only circumstantial, inconclusive evidence was admitted and that this evidence was interpreted in a prejudicial manner." Appeal at 1.

[7]Initially, we must comment on respondent's addition in his appeal of various statements inconsistent with earlier testimony and of new legal theories to support arguments made at the hearing. These are matters that would be considered in a petition to reopen, not an appeal (and, we note, there is no indication why respondent did not raise or could not have raised them at the hearing before the law judge). We will not consider changes in respondent's testimony or newly offered reasons to support his prior statements.

told by his own doctor that he had a drug and alcohol problem. Tr. at 293-294, 300.[8] Two and one-half months prior to his application, respondent had been arrested for the theft of syringes from a pharmacy, and needle marks had been found on his arm. Tr. at 299 and Exhibits C-1-3.[9] Respondent further admitted, concerning Item 21(n) and Item 21(v)'s traffic convictions, that at the time he filled out the application, he knew he had two "driving under the influence" (DUI) convictions in 1982, one in 1984, and one in 1989, and one conviction in 1990 for failing to stop at a stop sign. He was still under probation, with driving restrictions, when he completed the medical application (in which he identified only one traffic violation, a DUI in 1987). Tr. at 295-298.

At the hearing, respondent argued primarily that, although he had a drug and alcohol "problem," he had no reason to consider it a "habit," and in any case he had no such problems at the time he completed the application. Under the circumstances, and given other testimony of record, it was not error for the law judge to reject these claims.

This second argument needs little response. It ignores the wording of Item 21, which seeks, in addition to current

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[8]Respondent later stated that this testimony referred to his 1991 medical application. He agreed, however, that the answers would be the same for the 1990 application. Tr. at 301-302.

[9]Respondent was later convicted of the theft. See Exhibit C-8.

information, prior medical history. The first argument has more substance, but we remain unpersuaded.

Respondent admits that he "did have a substance abuse." Tr. at 267. "Habit" is typically and reasonably understood to refer to a tendency or custom of behavior. The evidence of respondent's past behavior reflects sufficient use of drugs and alcohol to be considered a habit. Especially in light of Item 21(o), which refers to a drinking habit, it would not be reasonable to restrict the word's reference solely to a colloquial use (i.e., drug addiction). This is true despite respondent's testimony that, during his treatment, the word habit was not used.

In a case with very similar facts, we affirmed the Administrator's interpretation of "habit." See Johnson, supra (excessive drinking habit evidenced by hospital admission and respondent's acknowledgment that he had a problem with alcohol use; respondent's application acknowledged hospital admission but failed to indicate that its prime purpose was treatment of his alcohol problem). We can see nothing arbitrary or capricious in the law judge's conclusion -- a conclusion predicated in some part on a credibility assessment. Administrator v. Smith, 5 NTSB 1560, 1563 (1987).[10]

[10]Respondent attempts to rely on the medical examiner's note on the application (i.e., that respondent had "no drinking problem"). However, not only can this statement be read to speak only to respondent's current condition, only half the question, but this information would have been provided by respondent to

In addition to (and somewhat inconsistent with) his claim that he had no drug or alcohol "habit," respondent argues that the word habit is vague. Respondent contends that the 1991 change in the wording of the application -- substituting a reference to substance abuse or dependence in place of the word habit -- demonstrates that the prior language was ambiguous and supports a conclusion that respondent answered truthfully, as he understood the question, and should not be faulted. That the FAA chose to amend the application in this manner does not, however, prove that the prior language was flawed in its application to respondent. Accord Administrator v. Boardman, NTSB Order No. EA-3523 (1992). Respondent further argues that United States v. Manapat, 928 F.2d 1097 (11th Cir. 1991), which involved claims of ambiguity in the application form, requires a finding in his favor. We have held to the contrary. Administrator v. Barghelame and Sue, NTSB Order EA-3430 (1991) (Manapat is not controlling in Board proceedings such as this).

Moreover, there is other evidence that supports the law judge's finding that respondent intentionally falsified his application. Respondent testified, with regard to his answer to

(..continued)
the doctor and is not proof of the matter. The law judge implicitly found it unreliable. This conclusion logically follows from another incorrect note made by the medical examiner indicating that respondent had only one DUI, and in 1987 (a factor that could have supported the examiner's note that respondent had no drinking problem). Respondent admitted that he probably gave the examiner that incorrect date, the correct date of the latest DUI violation being in 1989. Tr. at 303.

Item 21(v) regarding traffic offenses, to his belief that convictions more than 5 years past were not to be reported on his medical FAA application, and that various convictions had been expunged from his driving record. The first claim was controverted in other testimony by an FAA flight surgeon (Tr. at 198), and respondent offered no independent corroboration from the individual who ostensibly gave him this information.[11] The law judge's rejection of the second claim has not been shown to be arbitrary or capricious. Indeed, this contention is not supported by the record. The relevant Exhibit R-10 letter says only that these convictions "have been removed from your driving record," not that they do not reflect an historical record that the FAA requires be reported so that it may assess an applicant's fitness. See Commandant v. Rogers, 3 NTSB 4457 (1981).

Even were we to consider respondent's state of mind at the time of the application (evidence the law judge excluded but for which an offer of proof was made), our conclusion would not change. We would also note that there is no evidence to suggest that respondent sought clarification from the medical examiner regarding the meaning of the drug and alcohol questions, despite the clear opportunity to do so. It is, therefore, difficult to credit respondent's claim that he found them unclear. The record, instead, supports a finding that respondent intentionally

[11]Respondent could have subpoenaed the medical examiner to testify or could have suggested he be deposed.

falsified his application so that it would be granted with no further inquiry into his medical history.[12] And, we find no basis in the record for respondent's claim, citing to a portion of the transcript, that the law judge prejudged the case. We fail to see how the law judge's discussion of Item 21's wording demonstrates prejudice, and our review of the entire transcript indicates that the law judge was fair and impartial.[13]

Respondent also appeals the law judge's alleged failure properly to consider the outcome of a prior proceeding, SE-11862. That case was an emergency revocation based on certain (but not all) of the matters raised here.[14] Respondent appealed the Administrator's order. In a prehearing telephone conference among the parties and the law judge, it appeared that an agreement had been reached, part of which included withdrawal of respondent's appeal. A May 28, 1991 letter set forth the agreement. On the Administrator's motion, the law judge terminated the case the same day, noting that the appeal had been withdrawn.

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[12]The Administrator also shows, by way of impeachment evidence, that, despite Item 23's requirement to report medical treatment, respondent did not report his February 1990 hospitalization and, despite Item 21(u)'s requirement that he report admission to hospital, respondent did not do so.

[13]While one of the law judge's questions may not have been necessary (e.g., his question to respondent as to whether respondent had ever won any acting awards), we do not consider it of such moment as to indicate bias.

[14]The allegations were limited to the drug-related matters of Item 21(n), with no reference to 21(o) or (v).

Some weeks after the order had been entered, the FAA was advised by respondent of his disagreement with the FAA's understanding of the agreement.[15] The FAA informed the law judge that, in light of respondent's communication, it was willing to vacate the settlement, reopen the case, and proceed to hearing, and it sought to do so. Respondent agreed. July 1, 1991 letter to NTSB. In an order served June 25, 1991, the law judge declined to do so, finding that he had lost jurisdiction, more than 20 days after the decision terminating the proceeding having passed. See 49 C.F.R. 821.43. The Administrator thereafter withdrew the first complaint, and filed the second.

Law Judge Davis properly found that this sequence of events did not preclude the Administrator from prosecuting the instant, second complaint. We also find no basis to overturn his decision not to take evidence regarding the terms of the prior settlement. That was not a matter before him, and another forum was available to respondent had he wanted to pursue enforcement of his interpretation. Administrator v. Rippee, 4 NTSB 1041, 1042 (1983).

Even if (as is not the case) principles of double jeopardy applied, they would not prevent this proceeding, which raises new allegations of intentional falsification. That question aside,

[15]Respondent apparently believed that the complaint would be dropped pending further medical evaluation. Withdrawal of the appeal, however, would have resulted in the revocation becoming effective.

it is equally clear that the Administrator should not be precluded from bringing the second complaint here.

The first was never adjudicated. More importantly, the first was dismissed based solely on a settlement that respondent later repudiated and the Administrator was willing, as an accommodation to respondent, to ignore.[16] Respondent also agreed to the reopening of the first case. As a matter of fairness, we see little difference between reopening that case and instituting another claiming the identical FAR violation. A different result might attach if, after negotiating a settlement, the Administrator repudiated it and refiled the identical charges. In this case, however, it was not the Administrator who repudiated the settlement, it was respondent. The Administrator, it seems, made every effort reasonably to accommodate respondent. Under the circumstances, the Administrator should not be penalized for attempting to restore the status quo ante, and proceeding from there to an adjudication of a complaint, the amendment of which has not been shown to be inappropriate or unavailable.

[16]We note that the law judge, in declining to reopen, saw no ambiguity in the settlement terms.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.